Supreme Court of the United States

OCTOBER TERM, 1901.

Original, No. .....

THE STATE OF WASHINGTON, COMPLAINANT,

vs.

NORTHERN SECURITIES COMPANY AND OTHERS, DEFENDANTS.

Brief on Behalf of Northern Securities Company, Defendant, in Opposition to Application for Leave to File Bill of Complaint.

The complainant's bill is framed upon the same lines as the bill of the State of Minnesota which was under consideration in the case of Minnesota *v.* Northern Securities Company, decided February 24, 1902. The averments of the bill in this case are couched in identical language with many of the averments in the Minnesota case, the statements being varied only in a few particulars to meet the different conditions applicable to the State of Washington. Neither of the defendants is or is alleged to be a corporation of the State of Washington. Indeed, if any of the three defendants were a

corporation of that State, under the decision in Minnesota *v.* Northern Securities Company this court would have no jurisdiction of the parties.

The gravamen of the complaint is the formation of a corporation under the laws of New Jersey, to wit, the Northern Securities Company, whose object, as alleged in the complaint, is to furnish a holding company to which a controlling interest of the capital stock of the two defendant railway companies has been or is to be transferred, in order to make a practical consolidation of the two railway companies, and thereby to violate and evade the settled public policy and laws of the State of Washington, which are alleged to forbid the consolidation of stock, property, or franchises of railroad corporations owning competing lines, it being alleged that the lines of railway owned and operated by the Great Northern Railway Company and the Northern Pacific Railway Company are competing lines through that State.

To avoid the objection under which this court refused to entertain the bill of the State of Minnesota against the Northern Securities Company, the State of Washington has made The Great Northern Railway Company and The Northern Pacific Railway Company defendants.

The bill prays for no relief except by way of injunction. It prays that the Northern Securities Company may be enjoined—

First, from voting at any meeting of stockholders of either of the railway companies, or from in any manner acting as the owner of any shares of capital stock of either of them, and from attending any meeting of stockholders.

Second, from in any way aiding, advising, directing, in-

terfering with, or taking part, directly or indirectly, in the management, control, or operation of any of the lines of railway of either of said companies or their affairs.

Third, from exercising any of the powers or performing any of the duties or in any manner acting as the representative, officer, member of the board of directors, or employé of either of the railway companies.

Fourth, from acquiring any additional capital stock of said railway companies.

Fifth, that the railway companies may be enjoined from recognizing or accepting the Northern Securities Company as the holder or owner of any shares of stock of either of the railway companies, and from permitting the Securities Company to vote such stock, and from paying any dividend on stock to the Securities Company.

Sixth and seventh, that the two railway companies be enjoined from interfering with or controlling the policy or management or business affairs of each other.

The bill does not state under what law of the State of Washington the railway companies entered that State or are permitted to do business there. The Great Northern Railway Company is a corporation organized and existing under the laws of Minnesota, and the bill alleges (paragraph V) "that since February 1, 1890, the Great Northern Railway Company has continued to and does now control, operate, and maintain each and all of said lines" (being the lines theretofore enumerated, some of which extend through the State of Washington) "as one complete railroad system, and thereby became and continued to be a corporation subject to the laws, regulations, and provisions of the State of Washington relating to railway or railroad corporations, in-

cluding those provisions of the constitution of said State hereinafter specifically pleaded or referred to."

As to the Northern Pacific Railway Company it is alleged (paragraph VI) that it is a corporation of the State of Wisconsin and the successor of the Northern Pacific Railroad Company, a corporation organized under an act of Congress. The bill further alleges (paragraph VII) "that the Northern Pacific Railway Company since the year 1895 has continued to operate its system of railways within the State of Washington, and thereby became and continued to be a corporation subject to the laws, regulations and provisions of said State relating to railway or railroad corporations, including those provisions of the constitution of the State of Washington hereinafter specifically pleaded or referred to."

The Northern Securities Company is a corporation organized under the general corporation act of the State of New Jersey, strictly in accordance with the laws of that State, and has lawful right and authority under its charter "to acquire and hold any shares of capital stock created or issued by any other corporation or corporations of any other State, Territory, or country as fully and to the same extent as an individual person might or could do."

Every specific thing charged in the bill of complaint as having been done by the Northern Securities Company and its stockholders and by the stockholders of the two railway companies was in the exercise of a usual universally conceded right in and over personal property—the right to buy, sell, hold, and vote stock, and to pay and receive dividends thereon. The suggested injury that is feared is admitted to spring from the fact that one person, or a number of persons who are of one purpose, hold a majority or con-

trolling interest in the stock of two competing lines of railway—a thing not forbidden by the law of Washington or any other State.

None of the acts complained of as furnishing the basis of the complaint of the State of Washington is alleged to have been done within the jurisdiction of that State. The burden of the complaint is that acts lawful where done, acts not pretended to be governed by the laws of Washington, are injurious or calculated to be injurious to the State of Washington in its sovereign capacity, because the effect of those acts will be to destroy the spirit and policy of competition existing or at least which the State desires shall exist between these two railroads as operated within the jurisdiction of the State of Washington.

In the Minnesota case there was at least a show of justification for that State in its effort to get into this court to test the legality of the acts complained of, because one of the railway companies is a creature of that State and derives its corporate powers from the grant of the Minnesota legislature and is amenable to its laws in its corporate conduct. But in this case each of the corporations defendant is the creature of another State and owes no duty to Washington except to obey its laws in the mere operation of such part of its local business as is actually carried on within the territorial limits of the State. Who may own the stock of the railroad companies, how much any one person may acquire, the purpose for which it is acquired, the personnel of the boards of directors, all such matters are regulated exclusively by the laws of another State, and the State of Washington has no more right to question them than she has to regulate the title to lands in the District of Columbia. It is certainly an aston-

ishing proposition that Washington has a right to complain that a New Jersey corporation has acquired a majority of the capital stock of two railroad companies, one a Wisconsin corporation and the other a Minnesota company, merely because the railroad companies operate roads in Washington.

As was said by this court in Pullman Car Co. *vs.* Missouri Pacific R'y (115 U. S., 587, 597), speaking of a case where a majority of the stock of one railroad company was owned by another company:

"Practically it may control the company, but the company alone controls the road. In a sense the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs."

The idea of the complainant is that it has a right to supervise the number and character of the owners of the stock of a railroad company, and if it is found that they are harmonious among themselves and friendly with the stockholders of a competing company and are likely to elect managers who will harmonize, then the State can hold up the stockholders by injunction, deprive them of dividends, take away their right to vote, and compel them to desist from buying more stock.

No law of Washington or of any other State limits the amount of stock which one person, whether natural or corporate, may buy and hold. No law of any State or country makes the right to vote upon stock dependent on the motives or purposes of the stockholder. The action of the individual stockholders is not the action of the corporation, and cannot be treated as such for purposes of judicial relief. It

is the action of the corporation through its constituted officers and agents that is alone the subject of legal regulation. The injury, if any there can be, which may happen to the complainant must result from the action of the railroad companies and not from the action of the stockholders. The latter have no corporate rights or privileges in Washington, exercise none there, and claim none there. And it is not averred that the railroad companies are doing or threatening to do of themselves any act in derogation of free and open competition in the State of Washington.

It is not deemed necessary to repeat here the extended argument which was made before this court on behalf of the Northern Securities Company in opposition to the application of the State of Minnesota for leave to file its bill of complaint. A restatement of the points there urged will be sufficient without amplification.

I.

The bill of complaint does not present a case of a controversy of a civil nature which under the Constitution and laws of the United States is justifiable in this court.

This is a suit to enforce the local law and policy of a sovereign and independent State, whose right to make laws and to enforce them exists only within itself and by means of its own agencies and is limited to its own territory.

Whatever the law of the State of Washington is upon the

subject of the consolidation of railroad corporations (as to which we shall hereafter speak), it is a municipal or police law, and not one conferring rights of a proprietary or contractual nature. Neither the courts of the United States nor of any other jurisdiction outside of the State of Washington will lend their aid to the enforcement of the police laws of Washington.

Wisconsin *v.* Pelican Ins. Co., 127 U. S., 265, 297.
Chisholm *v.* Georgia, 2 Dall., 419, 431, 432.
Cohens *v.* Virginia, 6 Wheat., 264, 398, 399.
The State of Rhode Island *v.* The State of Massachusetts, 12 Pet., 657, 722, 731.
Hans *v.* Louisiana, 134 U. S., 1, 12, 14.
Capital Traction Co. *v.* Hof, 174 U. S., 1, 9.
Story on Conflict of Laws, pars. 7, 8, and 20.
Houston *v.* Moore, 5 Wheat., 1, 69.
Dred Scott *v.* Sandford, 19 How., 393, 460.

The cases of Pennsylvania *v.* Wheeling, &c., Bridge Company (9 How., 647; 11 How., 528; 13 How., 518; 18 How., 421, 429) and Missouri *v.* Illinois and Chicago Drainage District (180 U. S., 208) were both cases where civil rights were involved, and in each case the State showed a special and peculiar injury resulting from the threatened nuisance, such as would enable a private person to maintain a similar action in another court.

II.

The damage to the State of Washington which is apprehended from the acts of the defendants is remote, uncertain, and entirely consequential. It is not the direct result

of the acts of the defendants which are set out in the bill, but it is a result which, within the bounds of possibility, but not of certainty, may ensue from other acts which the defendants have not done, but will be enabled to do by reason of the ownership of the capital stock of the railway companies by the Securities Company. The objection is not to the acts already done, but to the position in which the defendants have put themselves, whereby, as the State of Washington apprehends, the Northern Securities Company has secured a vantage ground from which it may be able to thwart and overcome the public policy of that State.

Laws prohibiting the consolidation of railroad companies are substantially the same as those known as anti-trust acts, which are regarded as being enacted and enforced under the police power of the State.

Louisville & Nashville R. R. *v.* Kentucky, 161 U. S., 677, 695.

Reference is also made to the decisions of the Federal courts in suits to enforce regulations of railroad rates, to enjoin their breach, or to collect penalties for their violation.

State of Iowa *v.* Chicago, B. & Q. R. Co., 37 Fed. Rep., 497.

Dey *v.* Chicago, M. & St. P. R'y Co., 45 Fed. Rep., 82.

Maloney *v.* American Tobacco Co., 72 Fed. Rep., 801, 802.

State of Indiana *v.* Alleghany Oil Co., 85 Fed. Rep., 870.

Arkansas *v.* Kansas & Texas Coal Co., 183 U. S., 185.

III.

The fact that the State of Washington owns certain public institutions of an educational or charitable nature which are maintained at the expense of the State is entirely inadequate to bring the State within the category of a proprietor injured as to its proprietary or civil rights.

The injury to the State as the owner of these institutions by reason of an increase of freight rates on supplies, &c., if competition between these two railroads be destroyed, is too theoretical, remote, and uncertain to afford the basis of an action for an injury to civil rights. Such a proprietary interest does not make it the duty and obligation of citizens of other States to obey mere police regulations which are intended to promote in a general way the common welfare of the State and its inhabitants.

IV.

It is further insisted on behalf of the defendants that the State of Washington has no law, either statutory or constitutional, which forbids any act alleged to have been done or to be in contemplation by these defendants, even if such act were done within the State of Washington.

The complainant cites sections 14, 16, and 22 of article XII of the constitution of the State of Washington as the basis of its allegation of violation and evasion by the defendants of the law and policy of that State.

These articles as cited are as follows:

"ART. XII, SEC. 14. No railroad company or other common carrier shall combine or make any contract with the

owners of any vessel that leaves port or makes port in this State, or with any common carrier, by which combination or contract the earnings of one doing the carrying are to be shared by the other not doing the carrying."

"ART. XII, SEC. 16. No railroad corporation shall consolidate its stock, property or franchise with any other railroad corporation owning a competing line."

"ART. XII, SEC. 22. Monopolies and trusts shall never be allowed in this State, and no incorporated company, copartnership, or association of persons *in this State* shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustees, or assignees of such stockholders, or with any copartnership or association of persons, or in any manner whatever, for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity." * * *

Presumably because it did not make for the benefit of the complainant's case, counsel omitted to quote the concluding paragraph of section 22 of article 12. The omitted paragraph reads as follows:

"The legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchise."

Nothing more than a mere perusal of sections 14 and 16 is necessary to enable the court to see that none of the acts of the defendants or their stockholders or managers, set out in the bill of complaint, are within the terms of these sections.

Nor does section 22, when carefully examined, amount to

a prohibition of any of the acts alleged to have been done by the defendants.

The prohibition of section 22 is against incorporated companies, partnerships, or combinations of persons "*in this State.*" As a matter of fact and of law, neither of these defendants is a corporation of the State of Washington, if that is what is meant by the language quoted, nor is either of them doing any act "in the State" of Washington tending, directly or indirectly, to a combination or the making of a contract with any other company, foreign or domestic, for the purpose of regulating the transportation of any product or commodity.

All of the defendants are corporations of other States. All of the defendants and their stockholders and officers are doing the acts complained of within the jurisdiction of other States. The meetings of the railway companies are held respectively in the States of Minnesota and Wisconsin. The dividends are not paid in the State of Washington. It is not alleged that the boards of directors meet in the State of Washington. It is not alleged that either of the railroad companies has, directly or indirectly, combined or made any contract with any other company for any of the purposes mentioned in section 22.

As a matter of fact, none of the defendants have combined or made any contract for any of the purposes therein defined.

What is meant by "consolidation" and "combination" is well understood, and section 4304 of the Code of Washington indicates clearly what a consolidation of railroad corporations under the laws of Washington is understood to be.

Nothing in any of these sections forbids one person, whether a natural person or a corporation, from acquiring a

majority of the stock in two competing railroad companies. The prohibition is placed upon the companies themselves. It is their acts done for the purpose of consolidation and combination which are regulated, not the acts of the individual stockholders in selling their stock or transferring it to one person or a syndicate of persons for the purpose of control.

The omitted paragraph of section 22 indicates clearly that this section was intended to be a penal regulation, and that it was to be enforced only through laws passed by the legislature of the State; no such laws have ever been passed by the State of Washington; its legislature has not deemed it of sufficient public importance to provide, as directed by the constitution, for the enforcement of this section, either by penalties or by provisions for the forfeiture of corporate franchises.

Having declared the method by which this constitutional mandate should be enforced, namely, through laws passed by the legislature providing for (*a*) adequate penalties, (*b*) forfeiture of franchise, the State of Washington is limited to those methods for its enforcement. It cannot have also a remedy by injunction. The State attached no penalty to the constitutional provision, and obviously regarded it as inchoate and incomplete; it imposed the duty of final and perfecting legislation upon the legislature, but the work has never been completed and the State stands in the position of having made in its constitution a mere declaration of policy, which it has never provided the laws to carry into effect. It is with a very bad grace that it comes now to a Federal court and asks that court, in the exercise of its equity powers, to provide a sanction or penalty for the enforcement of a

constitutional mandate which the State has made no effort to enforce by the passage of proper laws.

This emphasizes in a very marked manner the point upon which the defendant insisted in the case of the State of Minnesota, and upon which they insist in this case, namely, that the State is endeavoring to supplement its own deficiencies through the power and process of the Federal Supreme Court, and by that means to affix a sanction to its police regulations where it has made no effort to enforce them within its own jurisdiction. It is a world-wide rule that such laws can have no inherent authority extra-territorially, and that the courts of one State will not lend themselves to the enforcement of the local policy or the penal or police laws of another sovereign, either within or without the territorial limits of the complaining sovereignty.

JOHN W. GRIGGS,

Of Counsel with Northern Securities Company.